FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE, *Petitioner,*

v.

FRANCES B. DAVIS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE AND THE FOUNDATION FOR SCIENCE AND THE HANDICAPPED AS AMICI CURIAE

JOHN D. LANE
MICHAEL D. SAVAGE
1211 Connecticut Ave., N.W.
Washington, D.C. 20036

Attorneys for Amici Curiae American Association for the Advancement of Science Foundation for Science and the Handicapped

Of Counsel:

HEDRICK AND LANE
Washington, D.C.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Consent to Filing	1
Interests of Amici Curiae	1
Statutes and Regulations Involved	3
Statement of the Case	4
Summary of Argument	5
Argument	5
Conclusion	17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE, *Petitioner*,

v.

FRANCES B. DAVIS, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE AND THE FOUNDATION FOR SCIENCE AND THE HANDICAPPED AS AMICI CURIAE

CONSENT TO FILING

This Amici Brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

INTERESTS OF THE AMICI CURIAE

The American Association for the Advancement of Science ("AAAS"), a non-profit organization founded in 1848, is a national scientific society embracing all of

the sciences. The objectives of AAAS are "to further the work of scientists, to facilitate cooperation among them, to foster scientific freedom and responsibility, to improve the effectiveness of science in the promotion of human welfare and to increase public understanding and appreciation of the importance and promise of the methods of science in human progress."

AAAS has 130,000 individual members and 280 affiliated organizations as federated members. These groups, ranging in size and interest area from the state and local academies of science to the 110,000-member American Chemical Society, give AAAS a secondary relationship with approximately seven million science professionals and lay supporters.

The Foundation for Science and the Handicapped, ("the Foundation"), founded in 1978, is a non-profit organization of successful handicapped scientists and professionals in various fields who offer their skills to help solve problems related to being handicapped. The Foundation is concerned with developing increased employment opportunities for handicapped scientists as well as providing interested handicapped youth an adequate background for approaching the various scientific disciplines as vocational objectives. Two other objectives of the Foundation are the development of technology designed to improve the quality of life for the handicapped and the dissemination of information regarding the ability of handicapped scientists to compete with their non-disabled peers for every scientific and management position.

All of the members of AAAS and those handicapped professionals in the Foundation for Science and the Handicapped have a unique interest in laws which de-

velop and increase opportunities in the various scientific fields. A ruling by this Court in favor of an admissions policy which can exclude a class of people, in this case the deaf and hearing-impaired, from a course of study would have grave implications for handicapped persons who seek to be evaluated on their individual abilities. Such a ruling could effectively preclude many potentially talented scientists and medical professionals from attaining the education necessary to succeed in their chosen professions.

It has been assumed that a handicapped person cannot safely and effectively perform as a nurse. It is the amici's position that handicapped persons can perform safely and effectively not only as nurses, but in many other science-related fields as well. In support of their position, amici offer herein data on handicapped nurses, doctors and scientists throughout the United States who are making valuable contributions to society and the progress of science in nursing and in other fields.

STATUTES AND REGULATIONS INVOLVED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

H.E.W. Regulations implementing section 504 of the 1973 Act, May 4, 1977, 45 C.F.R. Part 84.3(k)(3),

provide that for purposes of Section 504, "qualified handicapped persons" means

> (3) with respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

STATEMENT OF THE CASE

Frances B. Davis (respondent) is a licensed practical nurse who was academically qualified for admission to the postsecondary Associate Degree Nursing Program of the Southeastern Community College (petitioner). Ms. Davis was denied admission to this Program solely because she has a severe hearing disability.[1] Ms. Davis filed suit against the College, alleging discrimination against her because of her handicap, in violation of Section 504 of the Rehabilitation Act of 1973. The District Court dismissed her suit, holding that Section 504 allowed exclusion of a handicapped person from a federally assisted program solely by reason of the handicap if "the nature of the handicap renders the person unable to fully and effectively participate in the activity." 424 F.Supp. at 1345. The Fourth Circuit reversed, holding that Section 504 required that Ms. Davis be judged for admission solely on the basis of her academic and technical qualifications, and it remanded the case for that purpose.

[1] These facts, upon which there is no apparent disagreement, are developed more fully in the Briefs of Petitioner and Respondent.

SUMMARY OF ARGUMENT

The objective of the Congress in enacting Section 504 of the Rehabilitation Act of 1973 was to prohibit the kind of prejudgment of handicapped people which has occurred in this case, and Section 504 should not be interpreted in a manner which permits such prejudgment.

ARGUMENT

The issue in this case is whether Section 504 of the Act prohibits the exclusion of an academically qualified individual from an education program in nursing solely because she is handicapped by a severe loss of hearing.

The Fourth Circuit Court of Appeals has held that exclusion solely on the basis of the disability is prohibited under Section 504 and that the individual must be judged for admission to the program only on the basis of her academic and technical qualifications. The court of appeals did not rule on whether, based on these qualifications, Ms. Davis should be admitted. That is up to the College. Nor did the court of appeals express an opinion on whether, if admitted, Ms. Davis could complete the program successfully. That is up to Ms. Davis. The court of appeals merely held that Section 504 requires that she be given the same consideration for admission to the program that is accorded to nonhandicapped individuals.

Petitioner argues that exclusion based on disability is permitted under Section 504. Petitioner interprets Section 504 to permit exclusion of an individual if the nature of the individual's handicap renders her unable to fully and effectively participate in the program. Without explicitly stating it, petitioner necessarily interprets Section 504 to permit petitioner to determine

in advance whether the nature of Ms. Davis' handicap precludes her from successful participation in the program.

In enacting Section 504 of the Act, Congress recognized that there are common misconceptions about the ability of handicapped people to perform certain jobs. The term "handicapped person" does not represent any homogeneous group of people with uniform interests, needs or concerns. Each person, regardless of handicap, has individual strengths and weaknesses, needs and goals. Stereotypes and classification of handicapped persons strip away these individual characteristics which make each of us unique, and often prevent handicapped people who could perform certain jobs from even being given the opportunity to prove it. The existence of this state of affairs is not something which is, or needs to be, spelled out in Congressional hearings or Committee Reports. Observant men know that these misconceptions and stereotypes exist. AAAS and the Foundation believe that the case at bar is strong evidence that these misconceptions and stereotypes exist. Congress, in its wisdom, has identified the problem and sought to eliminate it by the enactment of Section 504. It is important that this Congressional objective be recognized here and now.

Petitioner interprets Section 504 to permit it to prejudge the effect of Ms. Davis' handicap on her ability to become a nurse. Armed with this power, petitioner has determined that, due to her handicap, Ms. Davis could never become a registered nurse. The fact is, however, that petitioner does not know whether this individual, Frances B. Davis, can complete the education program and become a registered nurse notwithstanding her hearing disability. Petitioner has never

observed Ms. Davis attempting to complete such a program. Petitioner relies chiefly on a conclusion expressed by the Executive Director of the North Carolina Board of Nursing that Ms. Davis' "hearing disability can preclude her being safe for practice in any setting allowed by a license as an RN, or by license as an LPN." However, the Executive Director does not know whether this individual, Frances B. Davis, can become a nurse. The Executive Director apparently has never met Ms. Davis and did not know that Ms. Davis had been licensed as an LPN since 1967. No one has made a determination that *Frances B. Davis* cannot perform as a registered nurse, and no one intends to provide an opportunity under which such a determination might be made. Instead, it has been *assumed* that all people with hearing disabilities similar to Ms. Davis' cannot function as nurses.

It is precisely assumptions such as this one that Congress has attacked in Section 504—assumptions which are wrong. There are today working registered nurses with severe hearing disabilities, and amici wish to advise the Court of their names and professional backgrounds.

In 1975, AAAS initiated a Project on the Handicapped in Science. This project was started under the auspices of AAAS's Office of Opportunities in Science which was established for the purpose of improving the status of women and minorities in science and increasing their number and visibility in the scientific community. The Project on the Handicapped in Science has made AAAS a national center for the concerns of the handicapped in science and for the improvement of scientific education for handicapped young people.

One task which the Project has accomplished is the gathering of information on handicapped people who are presently working in science-related fields. Much of this information has been published in a Resource Directory of Handicapped Scientists [2] which contains the names, addresses and fields of study of over 500 handicapped people. The Resource Directory shows that handicapped people are presently represented in a variety of professions ranging from medicine and law to computer sciences and pure physics. Listed below are the names of a number of nurses with hearing disabilities, with biographical material obtained for publication in present or future Directories:

(1) *Cathy Merriken, R.N.:* Ms. Merriken has had a severe hearing loss since the age of 6, and wears a hearing aid in her better ear. She attended regular public schools with hearing children throughout her education. She decided to attend nursing school and, once accepted, was on the Dean's List every year. Since graduation, Ms. Merriken has been working on the night shift as a registered nurse at Holy Cross Hospital in Silver Spring, Maryland. She works on a post-operative surgical floor, where she and a nurse's aide are in charge of thirty patients. The floor is busy and there is greater responsibility at night because fewer staff members are on duty. Ms. Merriken is taking courses at Montgomery Community College, and has been accepted by the University of Chicago to study for a PhD in Sumerian Linguistics. She has some problems because of her deafness, such as taking blood pressures, but these are resolved with the assistance of a nurse's aide. She has developed her other senses and skills and feels as competent as the other nurses, perhaps more competent.

[2] Owens, J. A., Redden, M. R. and Brown, J. W., 1978 *Resource Directory of Handicapped Scientists*, Library of Congress Catalog Number 78-64869, AAAS Publication Number 78-13. Several copies of this publication have been lodged with the clerk of the Court.

(2) *Erica Herzig, R.N.:* Ms. Herzig has a severe congenital hearing loss which has remained constant for the past twenty years. She attended private schools in New York, and received continuous speech therapy for her hearing disability. After graduation from Beloit College with a BS in Sociology, Ms. Herzig became interested in a nursing career. She was determined to complete the program, and with support from both fellow students and faculty members, she successfully completed her training. She is currently employed as a registered nurse at the Loeb Center for Rehabilitation at the Montefiore Hospital/Medical Center in New York City. She is a primary-care nurse with an average case load of eight patients. Ms. Herzig is in charge of all assessment, all medications, all treatment, all prescriptions, all vital signs for these eight patients, who have a variety of medical problems, e.g., medical, surgical, open-heart surgery, post-operative wound infections, diabetic, stroke, and cancer. She is able to care for all the patients' needs, and rarely calls another staff member for assistance.

(3) *Keith Ellen Ragsdale, R.N.:* Ms. Ragsdale has had a severe hearing loss since she was four years old. She wears hearing aids, and has excellent speech. She attended regular schools and had special training in lipreading and speech therapy. She graduated from Del Mar College in Texas with an AA degree, became a Registered Nurse, and later worked in an intensive care unit and coronary care unit. Ms. Ragsdale also

received a BS in Nursing, an MS in Community Health Nursing and was certified as a Nurse Practitioner in that component. After switching her career emphasis from acute care to community health, Ms. Ragsdale held various teaching positions in community health nursing and held the position of chairperson of the Texas Nurses Association Community Health Nursing Conference Group. She is currently teaching, administering and authoring a textbook on community health care.

(4) *Ann Keenan Ogden, R.N.*,[3] severely deafened as a result of chicken pox at age 3, works as a registered nurse in the advanced care and rehabilitation unit at Memorial Hospital Medical Center in Long Beach, California. She works with patients age 18 to 100 years, who are learning to cope with the effects of total joint implantation, stroke, paraplegia and quadraplegia. As staff nurse, she is responsible for patient care and treatment, which includes communication with patients and their families. She continues to develop her own communication abilities and residual hearing through speech therapy. Ms. Ogden is a graduate of a three-year program at St. Anthony's School of Nursing in Rockford, Illinois. She began speech therapy and lip-reading training at age 4 and spent most of her childhood in regular classrooms.

(5) *Kaye Herth, R.N.:* Born with a mild hearing loss at birth which has become more severe over the years and is now total, Ms. Herth is presently an Assistant Professor of Nursing at the University of Texas College of Nursing. She is a registered nurse, and has also received her MS in Medical Surgical nursing and a certificate in Physical Assessment. She has held positions as a Teamleader in Medical-Surgical, Staff and Charge Nurse on a Pediatrics floor, Fundamental's Instructor, Nursing Coordinator for Medical-Surgical, and Medical Surgical Instructor. Ms. Herth attended special classes for the hearing-impaired in grade school and participated in all lab courses in high school, college and at graduate school. She received some assistance with the lectures during college, but was never exempted from any courses or field trips. When she lectures to large groups of students in an auditorium, another instructor interprets the questions from the students in the back of the room. Ms. Herth has been elected to be listed in "Who's Who in American Women 1977-1978," 1979 "World's Who's Who of Women in Education," was named Outstanding Graduating Senior from Northern Illinois University, and Outstanding Graduate Nurse, Wisconsin 1969.

[3] Ms. Ogden's biographical sketch is taken from *Newsounds*, March/April 1976 (a publication of the Alexander Graham Bell Association for the Deaf, Washington, D.C.).

(6) *Holly Roth:* Ms. Roth, deaf since birth, has been accepted to the nursing school at Howard Community College in Columbia, Maryland and will begin training in September of 1979 to become a registered nurse. Without hearing aids, Ms. Roth is totally deaf and with hearing aids she can hear about 70% of what is said. She was trained to be a nurse's aide at the Katzenbach School for the Deaf in New Jersey, a state school for the deaf which has a good vocational training department. When she starts classes in the fall, Ms. Roth will be assisted by interpreters and will use an electronic stethescope to permit her to take blood pressures.

The above list is not all inclusive. There are, no doubt, many other people with hearing disabilities who are working as registered nurses. Some of them do not wish to be identified, or simply have not yet identified themselves to AAAS (or the Foundation). The search for hearing-impaired nurses has been conducted by word of mouth, and has only recently succeeded in contacting the nurses noted above.

Handicapped persons are represented not only in nursing, but in virtually every field of science, demonstrating that there are open-minded admissions directors who have determined that physical impairments may not necessarily interfere with the safe and conscientious practice of many science-related or medical professions. A few of the handicapped people working in other fields (most of whom are listed in the Resource Directory) are listed below:

(1) *John Gavin, PhD:* Dr. Gavin became totally deaf at the age of 33, and went on to earn a doctorate in biology. He is currently the Director of International Allergy Research for Miles Laboratories, and is involved in writing, research and travel abroad. He was never exempted from any courses or lab work, and the only accommodation he utilizes today is two telephones, so that his secretary can act as his "ears." His resume lists over 40 articles to his credit, and Dr. Gavin is recognized as the original stimulus for the AAAS Project on the Handicapped in Science. He attributes his success to "patience, plus persistence plus excellence in performance," and has noted that "the most difficult professional barrier to overcome is the limitations imposed by non-handicapped individuals who judge what you can do by what they think they could do if they had the same condition."

(2) *Nancy Sharpless, PhD:* Dr. Sharpless is a research biochemist who is currently an Associate Professor of Psychiatry at Einstein Medical College of Yeshiva University in New York City. She lost her hearing at the age of 14, is completely deaf with associated balance difficulties, and her speech, although not "normal," is clear. She earned a BA in Zoology from Oberlin, an MS in Medical Technology and a PhD in Biochemistry/Chemistry from Wayne State. She has never attended any special schools and has completed all the required lab courses in high school, college and graduate school. Two accommodations she made in the course of her study were to have other students take notes for her on field trips, and to have someone else get blood pressure readings when she worked with patients. These modifications were only minor, and she was never exempted from any classes or field trips. In her professional career today, she has her secretary take and make her phone calls, and conducts conferences with her colleagues in person, rather than over the phone. Perseverance is the main quality that she reports as essential to get her through her educational training.

(3) *Donald L. Ballantyne, PhD:* Dr. Ballantyne, deaf since birth, is currently Professor of Experimental Surgery, Chief of Microsurgical Research Laboratories, and Director of the Microsurgery Training Program at the Institute of Reconstructive Plastic Surgery at New York University Medical Center. He has an AB in Chemistry, an MS in Biology and a PhD in Biology, and completed all of the required lab courses for those degrees. He has had training in lipreading, and he uses two telephones, like John Gavin, to receive calls.

(4) *Myron Weinberger, M.D.:* Dr. Weinberger has a severe, apparently congenital, neurosensory hearing loss which was not discovered until his early school years. He taught himself lipreading, is able to communicate verbally, and has worn a hearing aid his entire life. He took no special courses nor had any special program to accomplish his educational goals, although teachers and counsellors all along the way tried to dissuade him from going into medicine because of his deafness. The only major difficulty he experienced during medical school was taking notes quickly enough in the basic science lecture courses. The problem of listening to heart and lung sounds has been resolved by his use of an electronic amplifying stethoscope.

Dr. Weinberger has received training in the areas of Pulmonary Disease, Cardiology and Endocrinology. He has a BA in Zoology and an MD degree from Indiana University, has published over 55 articles and studies, and has prepared almost 70 abstracts and presentations. He is currently a practicing physician and Director of the Specialized Center of Research in Hypertension at the Indiana University School of Medicine. He uses a volume amplifying telephone in his office, and notes a common problem for hearing impaired scientists: the inability to lipread in lectures and scientific meetings when lights are turned off to show slides.

(5) *Frank Hochman, M.D.:* Dr. Hochman graduated from college in 1957, but did not gain admittance to medical school until 1972 because medical schools refused to interview him. He is currently in a residency of family practice medicine in San Jose, California. Dr. Hochman has a severe hearing loss, and uses interpreters in the operating and delivery rooms. The only problem he had in medical school was making rounds in a hospital, where everyone would talk at once, making lipreading difficult. Surgery was not a problem because everything was discussed beforehand and there was very little talking during the actual surgery. Dr. Hochman uses an electronic hearing aid stethoscope, and a beeper which notifies him that he is being paged in the hospital.

(6) *Joseph J. Panzarella, M.D.:* Despite the fact that as a victim of multiple sclerosis he can move only his head and constantly needs an attendant, Dr. Panzarella is presently holding several jobs. In addition to his position as Director of the Brunswick Rehabilitation Center in Amityville, Long Island, he is Director of the Department of Rehabilitation Medicine at Franklin General Hospital in Valley Stream, Long Island; rehabilitation consultant to Continental Insurance Company; and Professor of Physical Therapy (and other subjects) at New York University Post Graduate Medical School, Nassau Community College and Suffolk Community College.

(7) *David Hartman, M.D.,* was the first blind person to have been admitted to an American medical school in almost a century. He graduated in the top 20% of his class at Temple University School of Medicine in 1976, completing all required courses with only minor deviations. He is planning to specialize in psychiatry with a special emphasis on physical and psychological rehabilitation of handicapped people.

David Hartman was born with congenitally deformed lenses and became totally blind at the age of 8. He was admitted to Gettysburg College and successfully com-

pleted all the lab work for a biology degree, substituting touch for sight in many lab experiments. He graduated Phi Beta Kappa in 1972, with a slightly less than A average in his coursework.

Recording for the Blind presented Dr. Hartman with the Founder's award, and RFB's president, John W. Castles, III, praised him "for exhibiting a triumph of the human spirit." The citation concluded "with the example of David Hartman before us, we feel renewed faith in the infinite possibilities of all people."

The people described above are all examples of people with severe hearing or other disabilities who are licensed as registered nurses or other science-related professionals and who are making valuable contributions to their communities and to society as a whole, notwithstanding their handicaps. Amici have provided the Court with these examples to demonstrate one point: the assumption that people with hearing disabilities (or any disability) cannot complete an education program and become registered nurses is an incorrect assumption which cannot be used to deny such people the opportunity to do so. Clearly, Congress knew that assumptions such as this are made and that they are wrong and dangerous. It seeks to eradicate them with Section 504. The Department of Health, Education and Welfare confirms that this was Congress's objective. In Regulation § 84.3(k)(3), defining a qualified handicapped person with respect to post-secondary and vocational education services, there is no language dealing with the effect of the handicap on the ability of such people to succeed in the program. Neither the Congress, HEW, the petitioner nor this Court knows whether a particular handicapped person can do the work notwithstanding her handicap. The purpose of Section 504 is to give her a chance.

CONCLUSION

Petitioner would interpret Section 504 to permit petitioner to do precisely what Congress sought to outlaw—the prejudgment of the capabilities of handicapped individuals. The court of appeals has realized that to interpret Section 504 in any manner which permits such prejudgment would defeat the Congressional purpose entirely and drain the law of all its substance.

This Court should exercise its power to direct Southeastern Community College to consider Ms. Davis for admission to its Associate Degree Nursing Program based solely on her abilities and without regard to her hearing impairment.

Respectfully submitted,

JOHN D. LANE
MICHAEL D. SAVAGE
HEDRICK AND LANE
1211 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 628-5923

Attorneys for *Amici Curiae*
American Association for the Advancement of Science
Foundation for Science and the Handicapped